IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1976

NO. 75-6909

GARY MANESS,

Petitioner,

v.

LOUIE L. WAINWRIGHT, etc.,

Respondent.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

REPLY BRIEF FOR PETITIONER

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ARGUMENT

A. The Petitioner's Claim Is And Has Always Been Based Upon His Right To A Fair Trial, Compulsory Process, Confrontation, And Cross-Examination, As Guaranteed State Defendants By The Due Process Clause Of The Fourteenth Amendment.

The facts upon which the petitioner's claim is based are clear on the record and are dealt with in detail in the brief for petitioner. In summary, the facts are as follows: Upon calling Linda to the stand, defense counsel requested that the trial judge permit him "to question the witness as an adversary and hostile witness." (A. 85) This request was denied by the court.[1] (A. 85)

Defense counsel sought to have Linda admit her guilt and exonerate the petitioner. (A. 85-86) Linda refused to do either, and testified in a manner consistent with the prosecution's theory of the case.

Defense counsel then repeatedly tried to adduce other evidence which would have contradicted Linda. He tried to cross-examine her, and tried to introduce admissions she had made. He also tried to show that she had made inconsistent statements, to impeach her credibility. The trial court repeatedly applied the voucher rule to preclude the defense from adducing this evidence. (A. 85-86, 88-92, 96-97, 123-124)

The respondent repeatedly relies on the "fundamental fairness" standard, and states that the petitioner's claim is based on that standard. (R.Br. 70, 72, 97-98) This characterization of the petitioner's claim and emphasis by the respondent is inappropriate, insofar as the petitioner's claim is also based on well established Sixth Amendment principles made applicable to the states through the Due Process Clause of the Fourteenth Amendment.

[1]Defense counsel subsequently made at least three other direct attempts to have the state judge reconsider her ruling, but to no avail. (A. 90, 91, 92)

The respondent contends that the petitioner did not raise a Sixth Amendment claim in the federal district court and should not be permitted to rely upon the Sixth Amendment for the first time in this Court. (R.Br. 101) The record before this Court clearly reflects that respondent's argument is totally without merit. The petitioner has consistently placed heavy reliance upon Sixth Amendment principles from the time of his direct appeal in state court, through the litigation in the lower federal courts, to his present posture before this Court on certiorari.

On direct appeal in state court, the petitioner argued that the trial court had violated his "right to due process of law and the doctrine set out in Washington v. Texas." (A. 182-183) (emphasis added) Washington v. Texas, 388 U.S. 14 (1967), holds that the Sixth Amendment right to compulsory process for obtaining witnesses applies to the states through the Due Process Clause of the Fourteenth Amendment.

Again, in the federal district court, the petitioner's application for a writ of habeas corpus expressly relied on Washington. The petitioner also relied heavily upon the more recent decision of this Court in Chambers v. Mississippi, 410 U.S. 284 (1973). Chambers, of course, was based at least in part on the principles enunciated in Washington. See Chambers, supra at 302. (A. 202) Although Chambers was decided on fundamental fairness grounds, the Court recognized and discussed in depth the applicability of the Sixth Amendment rights to confrontation and cross-examination.

In his application for habeas corpus relief, the petitioner claimed that the action of the state trial

court had deprived him of his "due process right to present a defense, his right to confront and cross-examine witnesses, and his right to call witnesses on his own behalf." (A. 202) This claim was based on the following language from Chambers:

> The right of an accused in a criminal trial to due process is, in essence, the right to a fair opportunity to defend against the State's accusations: The rights to confront and cross-examine witnesses and to call witnesses in one's own behalf have long been recognized as essential to due process. Chambers, supra at 294. (A. 200)

After denial of habeas corpus relief by the federal district court, the petitioner appealed to the United States Court of Appeals for the Fifth Circuit and argued:

> The district court erred in denying habeas corpus relief where the state trial judge applied a state evidentiary rule regarding the impeachment of one's own witness to preclude the petitioner from presenting evidence which would have tended to establish his defense, controvert the alibi testimony of the only other suspect's credibility, thus rendering the petitioner's defense far less persuasive and denying the petitioner due process of law. (Brief of Appellant at 10)

In addition to relying upon Chambers v. Mississippi and Washington v. Texas, the petitioner relied upon the newly decided case of Davis v. Alaska, 415 U.S. 308 (1974). Davis, of course, extended the Sixth Amendment right to confront and cross-examine to a state criminal defendant through the Fourteenth Amendment Due Process Clause.

Upon affirmance by the court below, the petitioner applied for certiorari review in this Court and presented the following question for review:

> Whether the instant decision of the United States Court of Appeals for the Fifth Circuit, which affirms a denial of federal habeas corpus relief where the state trial judge applied a state evidentiary rule regarding the impeachment of one's own witness to preclude the petitioner from presenting evidence which would have tended to establish his defense, controvert the alibi testimony of the only other suspect, and impeach the other suspect's credibility, thus rendering the petitioner's defense far less persuasive and denying the petitioner due process of law, is erroneous and is in real conflict with the decision by this Court in Chambers v. Mississippi, 410 U.S. 284 (1973) and the decision of the United States Court of Appeals for the Ninth Circuit in United States v. Torres, 477 F.2d 922 (1973). [2]

The petition expressly set forth the factual basis for the petitioner's claim, and requested this Court to review the judgment and opinion of the Fifth Circuit because the decision of the lower court misinterpreted and misapplied the facts and law of Chambers v. Mississippi. (Petition at 12) Thus, the petitioner's claim, since its inception on direct appeal, has been based on two very closely related aspects of Fourteenth Amendment due process: 1) fundamental fairness, and 2) the Sixth Amendment right to compulsory process and confrontation.

B. Contrary To Respondent's Contention, Petitioner Does Not Attack The Constitutionality Of Florida Statutes § 90.09 On Its Face, But Rather As Applied.

Contrary to respondent's contention, the petitioner does not challenge the constitutional validity of Florida Statutes § 90.09 implicitly or otherwise. (R.Br. 77) This case reflects a gross misapplication of that statute, as well as a denial of due process. However, section 90.09, on its face, can be and should be interpreted so as to be consistent with the requirements of Chambers v. Mississippi, supra.

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[2] Supreme Court Rule 23(c) expressly provides that "the statement of a question presented will be deemed to include every subsidiary question fairly comprised therein."

Defense counsel, on direct examination, inquired whether Linda had killed or struck her child. She testified that she had not. (A. 85) When defense counsel attempted to inquire whether Linda knew that Gary had not committed the crime, (A. 85-86) and again when defense counsel attempted to admit Linda's letters into evidence in an attempt to contradict her, (A. 88-92) the trial court thwarted his attempts on the basis that the evidence sought to be adduced was not inconsistent with Linda's testimony. (A. 88, 89, 90, 91, 92) These rulings constitute a misapplication of the provisions of § 90.09.

Section 90.09 provides:

> A party producing a witness shall not be allowed to impeach his credit by general evidence of bad character, but he may, in case the witness prove adverse, contradict him by other evidence, or prove that he has made at other times a statement inconsistent with his present testimony; but before such last mentioned proof can be given, the circumstances of the supposed statement sufficient to designate the particular occasion, must be mentioned to the witness, and he must be asked whether or not he made such statement.

Thus, the statute provides for two separate methods of contradicting a witness. If the witness is adverse, the witness can be contradicted by "other evidence" or proof of a prior inconsistent statement. Only when a party seeks to contradict his witness by proof of an inconsistent statement does the statutorily prescribed predicate come into play.

The principal problem encountered by defense counsel was that his every effort to inquire into the guilt of Linda and the innocence of Gary was thwarted by the trial court's acceptance of the state's objections based on the

voucher rule.[3] (A. 85-86, 88-92, 96-97) In each instance the trial court sustained the objection because, in the opinion of the trial court, the evidence sought to be admitted was not inconsistent with the limited testimony which the court had permitted the defense to elicit from Linda. (A. 88, 89,90, 91, 92)

Moreover, the fact that the trial court repeatedly sustained the prosecution's objections, under the circumstances of this case, indicates that the trial court took a narrow and unrealistic view of the requirement that the witness be "adverse". See Chambers, supra at 297-298. The facts and circumstances of the offense, and Linda and Gary's positions (A. 25, 89, 91) would, on the basis of common sense, lead an objective person to conclude that Linda must be considered adverse. But neither these factors nor the additional fact that Linda had filed for divorce against Gary (A. 92-93) was sufficient to impress the state trial judge.[4]

[3]Respondent indicates that "Florida law provides that a party may circumvent an adverse affect (sic) from the statutory voucher rule if that party proffers to the trial court that it cannot vouch for a witness's credibility," citing Tillman v. State, 44 So.2d 644 (Fla. 1950). (R.Br. 81) This contention proves too much. Upon calling Linda to the stand, defense counsel sought leave of court "to question the witness as an adversary and hostile witness." (A. 85) The fact that the trial court refused to call Linda as a court's witness upon defense counsel's initial and subsequent requests, pursuant to Tillman, adds to the trial court's responsibility for the damage done to the petitioner's ability to present a defense by the court's application of the voucher rule. Even after Linda had testified in a manner consistent with her innocence and the petitioner's guilt, the state trial judge repeatedly denied defense counsel's requests that Linda be declared an adverse or hostile witness. (A. 90, 91, 92) She responded to defense counsel's request that Linda be declared an adverse or hostile witness as follows: "That's right, and, boy, this is not an adverse witness." (A. 91) When defense counsel again raised the question, the judge said she had already ruled on that and quit arguing about it. (A. 92)

[4]The prosecutor urged an equally narrow and unrealistic definition of "adverse" or "hostile" witness upon the state court: "A hostile witness is one that won't answer the lawyer's questions when he asks questions on direct examination." (A. 92) This definition unrealistically excepts a witness who will answer a lawyer's questions, but will do so dishonestly and maliciously.

C. The Only Basis For The Trial Court's Exclusion Of The Evidence In Question Was Florida's Voucher Rule, Contrary To Respondent's Contention That Numerous Other State Evidentiary Rules Were Involved.

The respondent repeatedly relies on the argument that the petitioner's trial did not violate constitutional principles because "petitioner was precluded from utilizing various items of evidence because of numerous state evidentiary rules of law which warranted the exclusion of said evidence." (R.Br. 70) The respondent contends that "the record of petitioner's state court trial reveals that petitioner's excluded evidence was properly kept out because it failed to satisfy numerous principles of Florida evidentiary law." (R.Br. 71) (See also R.Br. 80, 82, 83, 91, 102) This contention is utterly false. The record reflects that the evidence in question was excluded because of the prosecution's invocation of Florida's voucher rule. The state trial court repeatedly and exclusively relied upon the voucher rule in sustaining the prosecution's objections. (A. 85-86, 88-92, 123-124)

Petitioner's position that the evidence in question was excluded solely on the basis of the voucher rule is supported by the finding of the court below that the evidence "was excluded by the state trial court on the authority of the Florida voucher rule." 512 F.2d 89. (A. 227)

Respondent notes that petitioner "called Linda Maness as his first defense witness. Immediately petitioner's attorney sought to impeach Linda before she had given any testimony either for or against petitioner. These questions (sic) were sustained on the ground that they were leading." (R.Br. 78)

The petitioner was entitled to exercise his right to cross-examine, as well as to adduce "other evidence" under

Florida Statutes § 90.09, without regard to whether Linda had given any testimony against the petitioner. Linda was clearly an adverse witness before she took the stand. Linda was the only other suspect. The state has listed Linda on its witness list, (A. 21-22) and the prosecution had subpoenaed her and brought her to the petitioner's trial from Texas. (A. 17) Additionally, defense counsel had twice indicated to the court that the petitioner's defense would be that Linda rather than Gary had committed the crime. (A. 25, 89)

It would be accurate to state that the prosecution objected to a number of defense counsel's questions to Linda as leading, and that those objections were sustained by the trial court. (A. 85-86, 89) However, it should be noted that had the trial court ruled that Linda was an adverse witness as repeatedly requested by the defense, counsel would properly have been permitted to lead the witness. Thus, the trial court's sustaining of these prosecution objections was but another form of the application of Florida's voucher rule to the detriment of the petitioner.

D. The Trial Court's Exclusion Of Linda's Letters Is Properly Subject to Redress By This Court.

Respondent argues that because the contents of all of Linda's letters were not made part of the record in the trial court, petitioner may not present the court's refusal to admit the letters into evidence[5] as reversible error because the record upon which such a reversal would be based is "incomplete." (R.Br. 50-51) This argument lacks merit. The record is replete with the efforts of defense counsel to admit these letters, the admission of which counsel characterized as "of utmost importance." (A. 89-90)

Defense counsel advised the court that he had a

[5]The court's basis for excluding these letters was Florida's voucher rule. (A. 88-89)

number of letters written by Linda to petitioner which he sought to introduce. (A. 88) The court immediately sustained the state's objection, which objection was based on the voucher rule. Defense counsel asked for argument on the question of the admission of the letters, and the trial judge specifically asked to see only the one letter which counsel had had an opportunity to present to the witness, Linda, to-wit: the letter dated April 28, 1971. As the letter was handed to the court, the prosecutor pointed out to the court that the letter or letters had not been marked for identification. (A. 88) The court, ignoring proper procedure, remarked "I know it." (A. 88)

> Q. (By defense counsel) Calling your attention to a letter dated April 28, 1971, I ask you, is this your signature and did you write that letter?
>
> A. (By Linda Maness) Yes.
>
> Q. To whom is that letter addressed?
>
> A. Gary.
>
> Q. Would you please read it to the Court.
>
> Mr. McWilliams: (Prosecutor) Objection, your Honor; improper predicate.
>
> The Court: Yes. Sustained.
>
> Mr. Minkus: Well, your Honor, can I have argument?
>
> The Court: Let's see it.
>
> Mr. Minkus: I have a whole bunch of letters, your Honor
>
> The Court: I just want to see the one we are talking about.
>
> Mr. Tunkey: (Prosecutor) It hasn't been marked for identification.
>
> The Court: I know it.
>
> Mr. McWiliams: This is not cross-examination, Judge.
>
> The Court: Sustained. (A. 88)

Thereafter, the court refused to allow any of the letters into evidence, based on Florida's voucher rule. (A. 90-91) Upon being advised by the court that the letters would not be admitted, defense counsel continued to argue for the introduction of the letters into evidence and as a result defense counsel asked:

> Mr. Minkus: Well, your Honor, I am just asking you; How do I go about entering these letters into evidence?
>
> The Court: You don't, not unless there's something that she says that's contrary. (A. 89)

Upon being advised that the letters would not be introduced, defense counsel, stating that the introduction of the letters was essential to the defense, asked for a recess so that he could research the law in order to find authority for the admission of the letters:

> Mr. Minkus: Your Honor, let me say this. It is of the utmost importance I get these letters admitted into evidence and the jury hears them. I would like to get an adjournment so I can find out how to do that.
>
> Mr. McWilliams: Judge, we have no time for law school. We are proceeding in the middle of a trial. (A. 90)

Upon being denied the recess, defense counsel once again asked for permission to treat Linda as an adverse witness:

> Mr. Minkus: Could I call her as an adverse witness?
>
> The Court: Do you want to let him?
>
> Mr. McWilliams: No, I object to it. She is not adverse. She will testify to the truth. (A. 90)

Thus, the court refused to admit these letters knowing that they were not marked for identification, refused to allow the defense to treat Linda as an adverse and hostile witness, and refused to grant defense counsel the recess he requested in order to research how the letters might properly be admitted into evidence. In light of the defense's herculean efforts to admit these letters, the respondent should not now be permitted to sustain the result reached by the court below on the basis that the letters were not marked for identification by the court. The fault, if any, in not having the letters properly marked, rests with the trial court, and not with the defense. Certainly, the failure to

have had these letters marked cannot legitimately be said to have been a waiver, voluntary or otherwise, by the defense of any of its rights with regard to the admission of these letters.

Furthermore, as is set forth in petitioner's main brief, sworn allegations as to the content of Linda's letters were made in the habeas corpus petition. (P.Br. 28-29) These statements were not controverted by the respondent in the district court. Moreover, the district court made specific findings as to the contents of these letters.[6] (A. 213-214) Because the habeas judge made findings as to the nature and contents of the letters, which findings were supported by the record, it is not proper for respondent to attempt to justify the denial of relief to petitioner predicated upon the perceived unavailability of the letters. See Walker v. Johnston, 312 U.S. 275, 284 (1941).

Respondent's argument that he could not deny the allegations appearing in the habeas corpus petition because the letters were not available is specious. (R.Br. 92) Rule 8(b) of the Federal Rules of Civl Procedure specifically provides:

> If he is without knowledge or information sufficient to form a belief as to the truth of an averment, he shall so state and this has the effect of a denial.[7]

---

[6]The district court's order of dismissal states:

> Petitioner then sought to introduce letters written by his wife to him in which she allegedly admitted that she was pregnant; that she knew petitioner had not done it; that she felt guilty about what she was doing to petitioner; and that she was not at the store during the afternoon of April 14, 1971. These letters were excluded by the trial judge because they were offered by petitioner to impeach or discredit his own witness. (A. 213-214) (emphasis added)

Neither these findings nor any other portion of the order of dismissal was the subject of a cross-appeal by the respondent in the court below.

[7]Rule 81(2) of the Federal Rules of Civil Procedure provides that those rules are applicable to habeas corpus practice.

The effect of the respondent's failure to deny the petitioner's averments is to admit same. This result is expressly provided for by Rule 8(d) of the Federal Rules of Civil Procedure. Thus, respondent's argument that he could not deny the averments in the habeas corpus petition because he had not read the letters is devoid of merit and should not be a basis in this Court or in the lower court upon which to deny this petitioner relief.

E. Respondent's Policy Argument Is Predicated Upon A Gross Mischaracterization Of Petitioner's Position.

Respondent attempts to argue that there are strong policy reasons why the petitioner's claim should not be redressed by this Court. (R.Br. 98-101) Respondent, rather incredibly, has mischaracterized your petitioner's position as follows:

> The very essence of Petitioner Maness' argument is that a defendant must be given free rein to present any evidence which in some way would support his defense in total derrogation (sic) of evidentiary rules of law. He seeks to threaten the trial court with the Constitution, thereby turning a shield into a sword. Petitioner thereby seeks to place the various governments of this country in the following position: The government cannot admit evidence obtained in violation of a defendant's constitutional rights no matter how truthful and telling that evidence is. Furthermore, the government must tow (sic) the line regarding evidentiary law, and if it faulters (sic), the defendant may press for reversal. But, when a defendant seeks to present evidence, nothing can stop him. He can act free of contraint while the government must passively stand by. The specter of such a situation is chilling. (R.Br. 98-99)

This gross mischaracterization manifests the respondent's fundamental lack of understanding of the issue before this Court. Petitioner is not attempting to carve out a special rule which would be applicable only to defendants in criminal trials. Rather, petitioner is attempting to end the arbitrary application of an archaic rule of evidence, the voucher rule,

which arbitrarily and capriciously prevents the prosecution as well as the defense from introducing into evidence relevant and material matters which have substantial value with regard to the truth finding process. The cases cited in petitioner's main brief establish that many state courts have applied Chambers to admit evidence by the prosecution notwithstanding the voucher rule. (P.Br. 30, 32, 33, 37)

F. The Respondent's Argument Regarding Exhaustion Of State Remedies Should Be Disregarded Or Rejected Because It Is Not Properly Before This Court, Was Not Presented To The Court Below, And, If Accepted By This Court, Would Alter Rather Than Affirm The Judgment Of The Court Below.

Respondent devotes one of his two arguments to his contention that the federal district court properly denied habeas corpus relief because the petitioner failed to adequately exhaust state remedies. (R.Br. 34-70) That argument should be stricken[8] or disregarded by the Court because it is not properly before this Court. Even if the Court considers the argument, the argument should be rejected.

1. The exhaustion issue is not properly before this Court because it was not part of the question presented for review, and was raised for the first time in this Court in the respondent's brief on the merits in violation of the express provisions of the rules of this Court.

The exhaustion issue was not raised in the petition for certiorari in this Court or in the respondent's brief in opposition. No cross petition was filed by the respondent.

The petition for certiorari in the instant case presented only one issue. That issue related to the treatment by the court below of the merits of a habeas corpus petitioner's claim that as a result of the application of Florida's voucher rule, his constitutional rights have been violated.

[8]At the time of this writing, petitioner has a motion to strike this argument pending before this Court.

The respondent, in his brief in opposition to the petition for writ of certiorari, expressly adopted the question presented by the petitioner. (R.Br. in Opp. 1) No other question was raised by the respondent. In his argument, respondent made no mention whatsoever of the exhaustion question. His argument was related exclusively to the question presented by the petitioner. The exhaustion argument is not a subsidiary question which could be said to be fairly comprised within the question presented.

Supreme Court Rule 40, which relates to both petitioners' and respondents' briefs on the merits, expressly provides that a brief may not raise additional questions or change the substance of the questions already presented in a petition for certiorari. Supreme Court Rule 40(1)(d)(2) and 40(3). Thus, pursuant to Rule 40, the exhaustion argument presented by the respondent is not properly before this Court and should be disregarded or stricken. Rondeau v. Mosinee Paper Corp., 422 U.S. 49 n. 11 (1975); Cort v. Ash, 423 U.S. 812 , 96 S.Ct. 2080 n. 6 (1975); Neely v. Martin K. Eby Constr. Co., 386 U.S. 317, 330 (1967); J. I. Case v. Borak, 377 U.S. 426, 428-429 (1964); Irvine v. California, 347 U.S. 128, 129 (1954).

The respondent requests that the exhaustion issue be considered as plain error in order to escape the normal effect of Rule 40(1)(d)(2). (Response to Petitioner's Motion to Strike, at para. 9) This position is contrary to law and to the position taken by the respondent in the federal district court. In his response to the district court's order to show cause the respondent admitted that the exhaustion doctrine "is based upon the principle of comity rather than jurisdictional limitation, McIntyre v. New York, 329 F.Supp. 9 (D.E.D., 1971); Bell v. Alabama, 367 F.2d 243,

248 (5th Cir., 1966) ...." (A. 208-209) The respondent contends in his brief to this Court that the doctrine is "quasi-jurisdictional". (R.Br. 69)

The exhaustion doctrine, however, does not give rise to an issue which may properly be characterized as "plain error" or "quasi-jurisdictional." "The rule of exhaustion is not one defining power but one which relates to the appropriate exercise of power." Fay v. Noia, 372 U.S. 391, 420 (1963), quoting with approval from Bowen v. Johnston, 306 U.S. 19, 27 (1939). More recently, this Court has described the exhaustion requirement as "merely an accomodation of our federal system designed to give the State an initial 'opportunity to pass upon and correct' alleged violations of its prisoners' federal rights." Wilwording v. Swenson, 404 U.S. 249, 250 (1971). See also Bell v. Alabama, 367 F.2d 243, 248 (5th Cir. 1966).

The application of the exhaustion doctrine has traditionally been careful, but flexible. Its requirements have, for a variety of reasons, been waived in whole or in part by various federal courts and custodians of state prisoners. See, e.g., Thomas v. Arizona, 356 U.S. 390 n. 1 (1958); West v. State of Louisiana, 478 F.2d 1026, 1034 (5th Cir. 1973), aff'd in pertinent part 510 F.2d 363 (5th Cir. en banc 1975); Boyer v. City of Orlando, 402 F.2d 966, 968 (5th Cir. 1968).

Assuming arguendo that the exhaustion argument could constitute "plain error", it is submitted that there is nothing in the facts and circumstances of this case to encourage the Court to exercise its option to review the argument. To the contrary, justice will be best served by disposing of this case on the merits. The petitioner has already been paroled by the State of Florida. (R.Br. 2) The

expense of this protracted litigation, which is being borne by the State of Florida, mounts daily. If the respondent was concerned about the issue he should have properly presented it for the consideration of this Court, if not for the consideration of the court below.

2. The exhaustion issue is not properly before this Court because it was not presented to the court below and formed no part of the judgment of that court.

The respondent did not attempt to argue the question of exhaustion either in his brief or during oral argument before the three judge panel of the court below. Subsequent to the rendition of the panel's decision, which affirmed the dismissal on the merits, the Fifth Circuit granted petitioner's suggestion for the appropriateness of rehearing en banc, and provided for supplemental briefs.

In his supplemental brief to the court en banc respondent raised the exhaustion issue for the first time before the Fifth Circuit. Petitioner moved to strike that portion of respondent's supplemental brief dealing with exhaustion.

This motion to strike was based on two basic principles: First, in that the respondent had not cross-appealed, he could not attempt either to enlarge his rights under the judgment or lessen the rights of the petitioner, citing Abel v. Brayton Flying Service, 284 F.2d 713, 717 (5th Cir. 1957), and also referring to Swarb v. Lennox, 405 U.S. 191, 201 (1972). Second, in that the respondent had not presented the exhaustion issue to the panel and the decision of the panel in no way addressed itself to that issue, it was improper for the respondent to raise the argument for the first time on rehearing en banc.

The Fifth Circuit entered an order stating that the motion to strike would be "taken with the case."

Thereafter, the Fifth Circuit vacated its order granting rehearing en banc. The opinion vacating the order granting rehearing en banc dealt with the merits of petitioner's claim, and reinstated the panel's decision on the merits. Thus, respondent's argument concerning the exhaustion of state remedies was not presented to or considered by the court below.

It is submitted that this case presents no reason for deviation from the normal policy of this Court that issues which have not been presented to the court of appeals and are not properly presented for review here will be disregarded. See Cort v. Ash, supra at n. 6; Neely v. Martin K. Eby Constr. Co., supra at 330.

> 3. The respondent's exhaustion argument, if accepted by this Court, would vitiate rather than affirm the judgment of the court below, which judgment is on the merits.

Respondent cannot be heard to argue that the exhaustion question is simply another means to support the judgment of the court below. The decision of the court below was based entirely on the merits of the case. Respondent's exhaustion contentions, if accepted by this Court, would lead to an entirely different result than that reached by the court below. This result was clearly not contemplated by the court below and, in effect, would vitiate its decision. The respondent should not be permitted to use this proceeding to collateraly attack the decision of the court below, in the guise of supporting that decision.

The petitioner's position in this regard is directly supported by Rondeau v. Mosinee Paper Corp., supra. In Rondeau, the respondent attempted to raise a point which had not been raised in the petition or respondent's opposition thereto, nor had it been made the subject of a cross-petition. This Court refused to consider the point:

> Because it would alter the judgment of the Court of Appeals, which like that of the District Court had effectively put an end to the litigation, rather than providing an alternative ground for affirming it, we will not consider the argument when raised in this manner. (citations omitted) Id. at n. 11.

Respondent has sought to justify his exhaustion argument on the principle that the prevailing party has broad latitude in presenting arguments which support the judgment on review. However, as in Rondeau, this principle cannot justify the respondent's position.

The respondent is not merely presenting an argument which involves "an attack on the reasoning of the lower court or an insistence upon a matter overlooked or ignored by it." (R.Br. 66) The exhaustion argument advanced by the respondent, if accepted by this Court, would clearly not constitute an affirmance of the judgment of the court below, which decided the petitioner's case on the merits and effectively put an end to the litigation.

> 4. Even assuming arguendo that the exhaustion issue is properly before this Court, the Court should find that the exhaustion doctrine has been satisfied.

The respondent accurately states that in order "[t]o satisfy the exhaustion requirement, the substance of the state prisoner's federal claim must be fairly presented to the state court." (R.Br. 43) The respondent's statement of the requirement comports well with a recent statement of the requirement by the United States Court of Appeals for the Fifth Circuit:

> A habeas petitioner need not spell out each syllable of his claim before the state courts in order to satisfy the exhaustion requirement of § 2254(b). It suffices that the substantial equivalent of a petitioner's federal habeas claim has been argued in the state proceedings. Lamberti v. Wainwright, 513 F.2d 277, 282 (5th Cir. 1975).

If this Court were to review this issue, it is submitted that the Court would find that this standard has been met.

The respondent properly presented this issue to one court, the federal district court. That court found that the petitioner had adequately exhausted his state remedies. (A. 215)

In the district court the respondent took the following position:

> Respondent does not here suggest the filing of a "repetitious application" Brown v Allen, 344 U.S. 443, or the "mere possibility of success in additional proceedings" Roberts v. LaVallee, 389 U.S. 40 (1967), but that if Chambers v Mississippi, is controlling of the instant course, it represents the first clear mandate that existing accepted state practice is deficient, and warrants that the state courts have the initial opportunity of compliance with the High Court's ruling. (A.209)

The district court, in its order of dismissal rejected the respondent's exhaustion argument. The district court quoted this Court's language from Chambers stating that "In reaching this judgment we establish no new principles of constitutional law." and went on to hold:

> It is the opinion of this Court that in his direct appeal the petitioner presented the Florida Appellate Court with a fair opportunity to apply the constitutional principles discussed in Chambers to the facts and circumstances of petitioner's case. See Chambers, supra at 305, footnote 3. (A. 215)

The due process claim presented to the federal district court was substantially the same as that presented to the state appellate court. That claim was that the state trial court's application of Florida's voucher rule had violated petitioner's right to a fair trial and the Sixth Amendment

guarantees included within the Due Process Clause.[9] (A. 182-183)

This argument was based on the following assignments of error filed on behalf of the petitioner:

> 8. The trial court erred in denying a defense motion to question Linda Maness as a hostile witness.
>
> 9. The trial court erred in excluding the testimony of Dana Maness and Ruth Maness relating to conversations with Linda Maness. (A. 173)

Respondent observes that "[p]etitioner did not assgin assign error to these rulings on constitutional grounds." This comment is inappropriate and misleading.

The Supreme Court of Florida has stated the following with regard to the function of an assignment of error:

> An assignment of error is the ground or point relied on for reversal on appeal. The assignment of error performs the same function in the appellate court as the complaint or declaration in the court of original jurisdiction. Redditt v. State, 84 So.2d 317 (Fla. 1955).

Florida Appellate Rule 3.5(c) expressly provides that assignments of error must refer to "identified judicial acts which should be stated as they occurred; grounds for error need not be stated in the assignment."

After oral argument, the state appellate court entered its judgment and opinion affirming the petitioner's conviction. (A. 186-187) The court approved the trial court's application of the voucher rule to sanctify the testimony of Linda Maness: "An attempt by the defendant to impeach his

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[9]The point on appeal in question (Point II), was supported by two other points of relevance here. In Point I, the petitioner argued that the evidence was insufficient because it did not exclude the reasonable hypothesis that the petitioner's wife was the responsible party. (A. 180-181) In Point III as well as Point I, the petitioner argued that the petitioner's confession had been involuntary and had been given by the petitioner in an effort to save his wife from jail. (A. 184-185)

own witness was properly denied by the court, on objection by the state." Maness v. State, 262 So.2d 716, 717 (Fla. 3rd D.C.A. 1972). (A. 187)

Respondent accurately observes that the court based its decision on state evidentiary law, rather than federal constitutional law. (R.Br. 37) However, the failure of the state court to address itself to or even mention the federal constitutional issue does not mean that the petitioner did not present such an issue or that the court was not afforded a fair opportunity to rule upon it.[10] To the contrary, the federal district court, the only court in which the issue was properly raised by the respondent, concluded that the petitioner had adequately satisfied the exhaustion doctrine. (A. 215) This conclusion is supported by this Court's decision in Wilwording v. Swenson, supra at 250 (1971):

> Section 2254 does not erect insuperable or successive barriers to the invocation of federal habeas corpus. The exhaustion requirement is merely an accommodation of our system designed to give the State an initial "opportunity to pass upon and correct" alleged violations of its prisoners' federal rights. Fay v. Noia, 372 U.S. 391, 438 83 S.Ct. 822 9 L.Ed.2d 837 (1963). Petitioners are not required to file "repetitious applications" in the state courts. Brown v. Allen, 344 U.S. 443, 449 n. 3, 73 S.Ct. 397, 403, 97 L.Ed. 469 (1953). Nor does the mere possibility of success in additional proceedings bar federal relief. Roberts v. LaVallee, 389 U.S. 40, 42-43, 88 S.Ct. 194, 196-197, 19 L.Ed/ 2d 41 (1967); Coleman v. Maxwell, 351 F.2d 285, 286 (CA6 1965).

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[10] There can be no legitimate argument that petitioner did not raise his constitutional claim as a basis for reversal in the District Court of Appeal of Florida, Third District. See argument A, infra at 1-4

See also McCluster v. Wainwright, 453 F.2d 162 (5th Cir. 1972).

Thus, because the Florida district court of appeal had a fair opportunity to pass upon petitioner's federal claim, it is unnecessary for petitioner to have made any additional applications to other Florida state courts.

CONCLUSION

For the reasons stated hereinabove and in the main brief for petitioner, the judgment of the court below should be reversed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true and correct copy of the foregoing Reply Brief of Petitioner was delivered by United States mail to the office of the Honorable Arthur Joel Berger, Assistant Attorney General, 8585 Sunset Drive, Suite 75, Miami, Florida, 33143, and to the Honorable William L. Rogers, Special Assistant Attorney General, c/o Snyder, Young, Stern, Barrett & Tannenbaum, 17071 West Dixie Highway, North Miami Beach, Florida, 33160, this 16th day of March, 1977. We further certify that all parties required to be served have been served.

Bennett H. Brummer Albert G. Caruana